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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re T & S Foods, Inc.

Serial No. 75/470,006

J. Scott Young of Dougherty & Associates for T & S Foods, Inc.

Samuel E. Sharper, Jr., Trademark Examining Attorney, Law Office 101 (Jerry Price, Managing Attorney).

Before Simms, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

T & S Foods, Inc., a corporation of North Carolina, has filed an application for registration of the mark "TOUCHDOWN PIZZA" (with the word "PIZZA" disclaimed) for "pizza" in International Class 30, and for "restaurant services, carry-out restaurants, and restaurants featuring home delivery," in International Class 42.¹

¹ Serial Number 75/470,006, filed on April 20, 1998, was based upon applicant's claim of first use of the mark in both classes on January 4, 1996, and first use of the mark in interstate commerce in both classes on the same day.

The Trademark Examining Attorney issued a final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark as used in connection with pizza and with restaurant services, so resembles the registered mark, "TOUCHDOWN CAFE and design," as shown below (with the word "CAFE" disclaimed), when applied to restaurant services, as to be likely to cause confusion, or to cause mistake, or to deceive.²



Applicant argues that its mark creates a different overall commercial impression from registrant's mark -- that the Trademark Examining Attorney has inappropriately dissected its mark to find confusing similarity with registrant's mark. Also, applicant takes the position that "Touchdown" is a highly suggestive mark for pizza, entitled to a narrow scope of protection. Finally, applicant argues that pizza is sold in places other than restaurants, e.g.,

² Registration No. 2,030,581 issued on January 14, 1997. The registration sets forth dates of first use of July 13, 1992.

presumably sold at retail in food stores, grocery markets, etc., and that the Trademark Examining Attorney has not taken this into consideration.³

The Trademark Examining Attorney, in turn, contends that the dominant portion of applicant's mark ("TOUCHDOWN") is identical to the dominant portion of registrant's mark, thus concluding there are strong similarities in the sound, meaning and overall appearance of the respective marks. Furthermore, the Trademark Examining Attorney argues that applicant's restaurant services are closely related if not legally identical to registrant's restaurant services. Moreover, the Trademark Examining Attorney asserts that applicant's goods ("pizzas") are the types of food items likely to be served in registrant's restaurant, and that food products and restaurant services are commonly marketed by a single entity under a single mark. In connection with the refusal to register, the Examining Attorney submitted third-party registrations showing that a single entity has

³ Although applicant makes this argument, the entire record herein suggests that applicant's pizzas are currently marketed exclusively through its two restaurants: "One of T & S Foods major business enterprises is Touchdown Pizza, a chain of restaurants, currently having two locations. The restaurants specialize in pizza, particularly pizza prepared in the shape of a football. One of the locations is a full service restaurant having dine in, carry-out and delivery service, while the second location features carry-out and delivery service." [Applicant's brief, p. 2].

registered the same mark for sit-down restaurant services, carry-out food services as well as for delivery to the homes of customers, especially of items such as pizza.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationships between the services and/or goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Under Section 2(d) of the Act, we must compare applicant's "TOUCHDOWN PIZZA" mark to registrant's "TOUCHDOWN CAFÉ and design" mark. The respective marks must be considered in their entirety. Nevertheless, in supporting a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant's mark begins with the most dominant, source-indicating feature of registrant's mark, and then appears with the generic word, "Pizza." That "a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." In re National Data Corp., *supra* at 751.

Clearly, when applicant's mark and registrant's mark are both viewed in their entirety, the term "TOUCHDOWN" is the dominating and distinguishing element of each mark. See, e.g., In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir 1997) [dominant portion of the mark THE DELTA CAFE and design (CAFE disclaimed) for restaurant services is the word DELTA.].

In finding that the marks are similar, we have kept in mind the normal fallibility of human memory over time and the fact that the average consumer retains a general rather than a specific impression of trademarks encountered in the marketplace. This is especially the case given the largely impulse nature of these particular purchases.

Similarly, while registrant's design feature may be prominent, it merely reinforces the football motif suggested by the word "Touchdown." Hence, we find that

these marks are similar as to sound, meaning and appearance.

Applicant argues that the word "Touchdown" is weak because it is a highly suggestive term for pizza:

'Touchdown' is, of course, closely related to the sport of football. Many activities are closely related to the sport of football in American society, including Sunday and Monday night television, drinking beer, and eating wings and pizza. One need only attempt to order a pizza on Superbowl Sunday to realize that pizza is a part of the football tradition. In that way, 'touchdown' brings football to the mind of the consumer, thereby invoking a thought of pizza. 'Touchdown' in this situation is highly suggestive with respect to both pizza, and a restaurant that sells pizza. [Applicant's brief, p. 9, emphasis in original].

However, we remain unpersuaded by applicant's attempt to portray the word "TOUCHDOWN" as being weak in the food or restaurant fields. Applicant never proffered any third party usage in support of this dubious proposition.

Given the strong similarity of the marks, the question of likelihood of confusion turns principally on the relationship between the applicant's services and registrant's services, as well as applicant's goods and registrant's services. As applicant has requested, we will be careful to analyze applicant's services and goods separately. However, as to the respective services, they

are legally identical -- both marks are applied to "restaurant services."

As to an analysis of applicant's pizza in relation to registrant's restaurant, it is well settled that goods or services need not be identical in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods and services are related in some manner. The circumstances surrounding their marketing need only be such that they would be likely to be encountered by the same persons under situations that would give rise to the mistaken belief that they are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

As to applicant's pizza itself, we acknowledge that there is no *per se* rule which mandates a finding that confusion is likely whenever eateries and various food items are marketed under identical or similar marks. To establish likelihood of confusion, more must be shown than that similar marks are used for various food products and/or for restaurant services. See, e.g., Jacobs v. International Multifoods Corporation, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982); and In re Central Soya Company, Inc.,

220 USPQ 914 (TTAB 1984). In the case now before us, we have applied no *per se* rule but have decided this case on its own facts, examining the applicant's and registrant's respective marks and particular goods and/or services. This is consistent with the reported decisions where the factual differences between cases having opposite results are often subtle ones.

The Examining Attorney has introduced use-based, third-party registrations demonstrating that restaurants frequently feature carry-out and home delivery services, especially when pizza is featured prominently in the trademark or on the menu. Although these registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods and services listed therein (which are the same types of goods and services involved herein) are of a kind which may emanate from a single source. Accord *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). In further support of this relationship, the Trademark Examining Attorney has submitted dozens of stories from the LEXIS/NEXIS® database

demonstrating the popularity of pizza as a menu item in a wide variety of very different kinds of restaurants.

Accordingly, we find that the subject marks are similar as to sound, meaning and appearance, that the services are identical, and that applicant's goods are closely related to registrant's services, resulting in a likelihood of confusion.

Decision: The refusals to register this mark for goods and for services are hereby affirmed.

R. L. Simms

D. E. Bucher

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board